No. 14-990

IN THE

Supreme Court of the United States

STEPHEN M. SHAPIRO, O. JOHN BENISEK, AND MARIA B. PYCHA,

Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR JUDICIAL WATCH, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

Judicial Watch believes that the decision below raises an important issue of federal election law that should be heard by this Court. In particular, Judicial Watch is concerned that the Fourth Circuit's ruling violates the Three-Judge Court Act and will allow states to delay judicial review of gerrymandered redistricting plans that disenfranchise voters and violate the Constitution. Judicial Watch has represented parties in two recent cases in Maryland concerning a ballot referendum on the state's gerrymandered redistricting plan. Moreover, Judicial Watch may wish to be involved in challenges to gerrymandering on behalf of members or clients in the future, and believes the federal judiciary should not be erecting further obstacles to review.

REASONS FOR GRANTING THE PETITION

This case cleanly presents a circuit split on the most fundamental question under the Three-Judge

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief more than 10 days prior to its due date. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Court Act: when must a case covered by the Act be heard by a three-judge district court? The Three-Judge Court Act mandates that such courts hear all constitutional challenges to legislative redistricting, as well as certain actions under the Voting Rights Act, the Bipartisan Campaign Reform Act, and numerous other federal statutes[2]—unless the district judge to whom the case is initially assigned "determines that three judges are not required." 28 U.S.C. § 2284(b)(1). In that circumstance only, the single judge may dismiss the case instead of referring it to a three-judge court. However, this Court has long been clear—and, for decades, the circuits all agreed—that the bar for three-judge referral is quite low.

Under that standard, a claim must be heard by a three-judge court unless the claim is "obviously frivolous," "essentially fictitious," "wholly insubstantial," or "obviously without merit"—which occurs only when the claim's "unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (quoting *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1933); *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910)); *see also LaRouche v. Fowler*, 152 F.3d 974, 982 (D.C. Cir. 1998) ("The Supreme Court

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[2] These additional statutes include the Civil Rights Act of 1964, the Prison Litigation Reform Act, the Presidential Election Campaign Fund Act of 1971, the Child Internet Protection Act, and others. *See* 17A Wright, Miller, Cooper & Amar, Federal Practice and Procedure § 4235 nn.3-5 (3d ed. 2014) (collecting examples).

made clear just how minimal a showing is required to establish substantiality in *Goosby v. Osser*."). Put differently, one-judge dismissal is appropriate only "if the claim is so insubstantial that it does not invoke federal jurisdiction," which "will be rare indeed." 17A Wright, Miller, Cooper & Amar, Federal Practice and Procedure § 4235 (3d ed. 2014). As the petition explains, Petitioners' First Amendment claim plainly satisfies this undemanding standard. Pet. at 26-29.

In 2003, however, the Fourth Circuit parted ways with this long line of authority. Under *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), a case need not be referred to a three-judge court if the complaint fails to state a claim under Rule 12(b)(6). *Id.* at 772-73. The Fourth Circuit has thus replaced the longstanding test of frivolousness with a plausibility standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Rule 12(b)(6) requires "a claim to relief that is plausible on its face").

As the petition demonstrates, that rule conflicts with decisions from this Court as well as from the D.C., Second, Third, Fifth, and Seventh Circuits. *See* Pet. at 10-18 & n.4. And the Fourth Circuit's novel approach creates significant problems. For one, it enlists a single district judge to decide the legal sufficiency of a redistricting challenge (as part of any Rule 12(b)(6) motion). Such an allocation of authority cannot be squared with Congress's judgment—recognized by this Court and others—that apportionment challenges and other types of three-judge cases are too important to be decided in the first instance by a single judge. Nor is the difference between one and three judges merely a formality.

Redistricting cases raise difficult legal issues on which three-judge courts frequently divide, including at the motion-to-dismiss stage.

Moreover, with a plausibility standard, the question of whether a case should be dismissed by one judge or heard by three becomes far more ripe for dispute—with the possible need for appeals to the courts of appeals and even this Court. Such fights over whether three judges should *hear* the case can only delay adjudication of the case's actual merits. Particularly in redistricting cases, such delays can matter a great deal. Indeed, courts will sometimes decline to order relief in redistricting cases—even if there is a constitutional violation—simply because the election schedule leaves too little time to adjust district lines. This scenario is less likely with the traditional frivolousness standard for referral, which expedites three-judge consideration of the merits. The Fourth Circuit's rule, in contrast, can only slow these cases down.

In short, the split in authority on the standard for three-judge referral has great significance. This Court should resolve the conflict among the circuits on this question fundamentally important to all redistricting challenges and, indeed, all other cases implicating the Three-Judge Court Act.

I. THE FOURTH CIRCUIT'S RULE DEFEATS THE PURPOSE OF THREE-JUDGE COURTS BY HAVING ONE JUDGE DECIDE A CLAIM'S LEGAL PLAUSIBILITY.

Three-judge district courts are "a unique feature of our jurisprudence." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). They are available only "when an action is filed challenging the constitutionality of the

apportionment of congressional districts or the apportionment of any statewide legislative body" or "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a). Such cases call for proceedings markedly different from the typical federal lawsuit.

Specifically, when a three-judge court is requested, the judge to whom the suit was initially assigned "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." 28 U.S.C. § 2284(b)(1). Those three judges—the initially assigned district judge, a circuit judge, and a third judge—"shall serve as members of the court to hear and determine the action or proceeding." *Id.* Although a single member of the three-judge court "may conduct all proceedings except the trial" and can enter most "orders permitted by the rules of civil procedure," only the full three-judge panel may "appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." 28 U.S.C. § 2284(b)(3). In addition, "[a]ny action of a single judge may be reviewed by the full [three-judge] court at any time before final judgment." *Id.* Appeals from three-judge district courts are taken directly to this Court. *See* 28 U.S.C. § 1253.

When enacting this "exceptional procedure," Congress "sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge." *Phillips v. United States*, 312 U.S. 246, 250 (1941). But Congress was also careful to make three-judge courts available only for "a limited

class of cases of special importance." *Id.* at 249 (quoting *Ex parte Collins*, 277 U.S. 565, 567 (1928)). That class of cases shrank in 1976, when Congress amended the Three-Judge Court Act. *See generally* Wright, Miller, Cooper & Amar, *supra*, § 4235 (discussing Act's evolution).[3] However, Congress "preserve[d] three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because *these issues are of such importance* that they ought to be heard by a three-judge court." S. Rep. No. 94-204, at 9 (1976) (emphasis added); *accord Page v. Bartels*, 248 F.3d 175, 190 (3d Cir. 2001) (quoting *id.*) (noting "the unique importance of apportionment cases"). Thus, as this Court subsequently put it, lawsuits implicating the current Three-Judge Court Act "raise issues that are likely to be *of great importance* and in Congress' judgment justify a three-judge court, expedited review, and direct appeal to this Court." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1985) (emphasis added) (addressing claims under Presidential Election Campaign Fund Act).

By requiring that single judges considering three-judge referral should decide whether the complaint can survive a Rule 12(b)(6) motion, the Fourth Circuit pays little heed to the importance of the cases covered by the Three-Judge Court Act, and to Congress's preference to "not leav[e] the fate of such litigation to a single judge." *Phillips*, 312 U.S. at 250. A motion to dismiss under Rule 12(b)(6) calls for an

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[3] Three-judge courts are no longer available for all constitutional challenges to state laws, for example.

assessment of both the allegations' factual plausibility as well as their "legal sufficiency"—such that a court must accept or reject a plaintiff's legal theory. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Accordingly, few events in a case are as important as a Rule 12(b)(6) motion to dismiss. Such motions are precisely what three-judge courts should be *deciding*, given that these courts exist to ensure "greater deliberation" of the significant cases at issue. *Phillips*, 312 U.S. at 250. By instead using motions to dismiss to *limit access* to three-judge courts, the Fourth Circuit has turned the Three-Judge Court Act's purpose and framework on its head.

This is no small matter. The cases implicated by the Three-Judge Court Act are not just important but also often legally contentious. Indeed, three-judge courts regularly split 2-1 when deciding motions to dismiss in apportionment cases. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000); *Johnson v. Mortham*, 915 F. Supp. 1529, 1559 (N.D. Fla. 1995); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd*, 509 U.S. 630 (1993).[4] If filed in the Fourth Circuit today, these cases might not even be *referred* to a three-judge court, depending on the views of the judge who initially drew the case. There is no basis for such a result, which flies in the face of the Three-Judge Court Act's very reason for existence.

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[4] Though decided in the Fourth Circuit, *Shaw* predated *Duckworth*'s adoption of a plausibility standard for three-judge referral.

II. THE FOURTH CIRCUIT'S RULE INVITES SIGNIFICANT PRACTICAL PROBLEMS.

Collapsing Rule 12(b)(6) and three-judge referral, as the Fourth Circuit has done, also invites major practical difficulties. These problems underscore how dramatically the Fourth Circuit's approach departs from what Congress intended.

As noted, Congress has provided that a three-judge court's decisions may be appealed directly to this Court, which is "a means of accelerating a final determination on the merits." *Swift*, 382 U.S. at 119. The circuits may still hear appeals in these cases, but only with respect to whether three-judge referral was wrongly denied. *See, e.g., Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16 (1962) (per curiam). When that question turns on whether the case is "obviously frivolous," *Goosby*, 409 U.S. at 518, denials are less likely, and any appeals should be faster to resolve.

Not so in the Fourth Circuit. Under *Duckworth*, single-judge courts deny referral more frequently, as the petition explains. Pet. at 18-20. Though these denials can be appealed to the court of appeals, such appeals—by turning on the more nuanced Rule 12(b)(6) standard—will likely take longer to decide. And the losing party could then seek this Court's discretionary review of any decision—all, again, just to determine whether a three-judge court should even *hear* the case.

The inefficiencies of the Fourth Circuit's rule are not limited to cases in which referral is denied. Even if a Fourth Circuit district judge grants referral by rejecting a motion to dismiss, the two judges then added to the panel might believe that the motion

should have gone the other way. These judges could overrule their fellow panelist's initial judgment. *See* 28 U.S.C. § 2284(b)(3) ("Any action of a single judge may be reviewed by the full court at any time before final judgment."). And the mere possibility of such a reversal will accordingly invite relitigation of the motion to dismiss that had just been decided. Even if the first judge's ruling holds up (because one of the two new judges agrees with it), the Rule 12(b)(6) battle will have taken two rounds instead of one.

These delays matter, especially in redistricting cases. As a general matter, any inefficiencies in these cases run counter to Congress's attempts to "accelerat[e] a final determination on the merits" in such litigation. *Swift*, 382 U.S. at 119. But the pace of a redistricting case can also affect not just when but *how* the case is decided.

Three-judge courts must "act and rely upon general equitable principles" when weighing possible remedies in redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). And timing considerations—such as "the proximity of a forthcoming election"—can preclude relief "even though the existing apportionment scheme [is] found invalid." *Id.*; *see also, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements."); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam) (affirming the district court's decision allowing state legislative elections to proceed even though districting plan was "constitutionally infirm in certain respects").

This concern is far from theoretical. Courts regularly deny immediate relief in redistricting cases not because the underlying constitutional claim lacks merit, but because of timing. *See, e.g.*, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2014 WL 5019686, at *17-18 (E.D. Va. Oct. 7, 2014) (three-judge court) (holding districting plan unconstitutional, but allowing elections to proceed under that plan because the general election was "roughly two months away"); *MacGovern v. Connolly*, 637 F Supp. 111, 115 (D. Mass. 1986) (three-judge court) (dismissing "substantively viable" redistricting challenge because of impending election, such that new district lines would "cause enormous disruption to Massachusetts voters, to candidates, and to the electoral process"); *Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996) (three-judge court) (assuming that challenge would prevail on merits and denying relief because "the harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction at this time"); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994) (three-judge court) (holding Texas district map unconstitutional but permitting its use in upcoming election), *aff'd sub nom.*, *Bush v. Vera*, 517 U.S. 952 (1996).

The traditional standard for three-judge referral reduces the odds that timing will force a court to tolerate a constitutional violation—for when the initial judge is simply making sure the challenge is not "obviously frivolous," *Goosby*, 409 U.S. at 518, it is unlikely that a case will linger while the judge considers referral. But when that judge is instead

applying the Fourth Circuit's more demanding standard for referral, *see Duckworth*, 332 F.3d at 772-73, the initial decision may take longer, referral-related appeals (including to this Court) are more likely, and it could take significantly longer before a three-judge court even has the opportunity to reach the merits of the challenge. And when the clock is always counting down towards the next election, such a delay can control whether the alleged constitutional violation can be remedied or if it is something that a state's voters simply must swallow. In the Fourth Circuit alone, the Three-Judge Court Act's ability to protect against such scenarios is substantially weakened.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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